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No. 97-2077

In the Supreme Court of the United States

OCTOBER TERM, 1997

ELLEN R. HIBBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), applies to a decision not to repair or to warn visitors about deterioration of a historic walkway at Arlington National Cemetery.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Andrulonis v. *United States*, 952 F.2d 652 (2d Cir. 1989)	7, 8, 9
Berkovitz v. *United States*, 486 U.S. 531 (1988)	5
Boyd v. *United States*, 881 F.2d 895 (10th Cir. 1989)	8, 9
Childers v. *United States*, 40 F.3d 973 (9th Cir. 1994)	8
Cope v. *Scott*, 45 F.3d 445 (D.C. Cir. 1995)	6, 7, 8, 9
Exxon Co., U.S.A. v. *Sofec, Inc.*, 517 U.S. 830 (1996)	6
Faber v. *United States*, 56 F.3d 1122 (9th Cir. 1995)	7, 9
Graver Tank & Mfg. Co. v. *Linde Air Prods. Co.*, 336 U.S. 271 (1949)	6
Kiehn v. *United States*, 984 F.2d 1100 (10th Cir. 1993)	8
Sumner v. *Mata*, 449 U.S. 539 (1981)	6
United States v. *Gaubert*, 499 U.S. 315 (1991)	5, 7, 8, 9
United States v. *Johnston*, 268 U.S. 220 (1925)	6
Valdez v. *United States*, 56 F.3d 1177 (9th Cir. 1995)	8
Zumwalt v. *United States*, 928 F.2d 951 (10th Cir. 1991)	8

Statutes, regulations, and rules: Page

Federal Tort Claims Act,
28 U.S.C. 1346(b) 2
28 U.S.C. 2671 *et seq.* 2
28 U.S.C. 2680(a) 2
National Cemeteries Act of 1973, Pub. L. No. 93-43:
§ 7a, 87 Stat. 82 2
§ 7b, 87 Stat. 88 2
24 U.S.C. 278 (1970) 2
Army Regulations:
§ 25-30 3
§ 290-5 2
Fourth Circuit Rules:
R. 36(a) 9
R. 36(b) 9
R. 36(c) 9

Miscellaneous:

Dep't of the Army Pamphlet 290-5, *Administration, Operation, and Maintenance of Army Cemeteries* (May 1, 1991) 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1-6) is unpublished, but the judgment is noted at 133 F.3d 915 (Table). The opinion of the district court (Pet. App. B 1-3) is unreported.

JURISDICTION

The court of appeals entered its judgment on January 7, 1998. A petition for rehearing was denied on March 27, 1998. Pet. App. C. The petition for a writ of certiorari was filed on June 24, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671, *et seq.*, waives federal sovereign immunity for specified tort claims against officers and agencies of the United States. Congress excepted from this waiver claims arising from federal officials' performance of discretionary functions. Section 2680(a) of Title 28 exempts from suit

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

2. a. Congress has charged the Secretary of the Army with the development and operation of Arlington National Cemetery. 24 U.S.C. 278 (1970).[1] Army Regulation 290-5 establishes the authority and assigns responsibility for operation of the Cemetery. See Army Reg. 290-5 (Sept. 1, 1980) (reproduced at C.A.J.A. 83-102). The Regulation directs that the Cemetery be established as a "permanent national shrine[ ] provided by a grateful nation to the honored dead of the Armed Forces of the United States." *Id.* at 91. The Regulation further instructs that the "standards for construction, maintenance, and operation of

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[1] While this provision was repealed by Section 7(a) of the National Cemeteries Act of 1973, Pub. L. No. 93-43, 87 Stat. 82, Section 7(b) of that Act (87 Stat. 88) provided that nothing in the repeal would affect in any manner the functions, powers, and duties of the Secretary of the Army regarding Army national cemeteries.

[the Cemetery] will be commensurate with the high purpose to which [it is] dedicated." *Ibid.*

b. Army Pamphlet 290-5 (Pamphlet) outlines administrative and maintenance goals for the Cemetery. Dep't of the Army Pamphlet 290-5, *Administration, Operation, and Maintenance of Army Cemeteries* (May 1, 1991) (reproduced at C.A.J.A. 118-170). The Pamphlet "serves as a guide to aid in discharging duties for the accomplishment of the overall Army cemetery mission" and as a "source of reference" for administrative policies and procedures. C.A.J.A. 121; see also Pet. App. A 4. Army Regulation 25-30 additionally provides that Army pamphlets are not the type of "publications that will be used to issue departmental policy." Army Reg. 25-30, ch. 2, § 1, 2-2 (March 27, 1989) (reproduced at C.A.J.A. 401).

Section 5-4 of the Pamphlet addresses the maintenance of roads, drives, walks, and drains. Pet. App. B 1; Pet. 3; C.A.J.A. 135. It states that Cemetery walks must not present a "hazard" to pedestrians. Pet. 3; C.A.J.A. 135. The Pamphlet does not define what constitutes a "hazard," nor does it specify how or when Cemetery employees must respond to hazards that develop. *Ibid.*; Pet. App. B 2. The Pamphlet provides only that, "[i]f immediate repairs cannot be made, barriers will be erected or other steps taken to prevent accidents." Pet. 3; C.A.J.A. 135. Section 5-4(g) permits, but does not require, the posting of signs warning of hazards. *Ibid.*

c. The Custis Walk, which provides the primary route of pedestrian access between the cemetery entrance and the Custis-Lee Mansion, is a pathway of special historical significance within the Cemetery. The Walk was constructed in 1879 to track Robert E. Lee's historic path as he departed the Custis-Lee mansion for the last time en route to Richmond, Virginia, the Confederate Capital.

C.A.J.A. 22, 40; see also *id.* at 31, 41 (discussing historical and architectural value of the Custis Walk).

3. During a visit to family grave sites at Arlington National Cemetery, petitioner fell while descending a series of steps on the Custis Walk. Pet. App. A 2. Petitioner fractured both ankles and her right leg, and is permanently disabled as a result. Pet. App. B 1. The area of the Custis Walk where petitioner fell was covered with leaves, which concealed broken concrete and stones that had broken off from the walkway. Pet. App. A 2. No signs or barriers warned the public of the potential hazard. *Ibid.*

4. After exhausting her administrative remedies with the Army, petitioner filed suit under the Federal Tort Claims Act. Pet. App. A 2; C.A.J.A. 11 (Complaint). The government moved for dismissal, arguing that the action was barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a).

The district court granted the government's motion and dismissed the case. Pet. App. B 1-3. The district court held that no federal statute, regulation, or policy specifically prescribed a course of action at the Cemetery regarding maintenance of the Custis Walk, thus leaving that matter to the Army's discretion. The Pamphlet failed to define a "hazard" to the public, to identify when warning signs were "necessary," or to prescribe how "hazards" would be alleviated once identified. *Id.* at B 2. The district court further found that the Army's discretionary decisions involving the Custis Walk were based on considerations of public policy. Pet. App. B 3 ("Decisions regarding when to remove leaves, repair steps and post signs require considering factors such as safety, aesthetics and available financial resources.").

5. The court of appeals affirmed. Pet. App. A 1-6. The court of appeals agreed with the district court that the

Pamphlet did not mandate specific actions or responses to the deterioration of the Custis Walk, leaving the matter within the discretion of cemetery officials. *Id.* at A 4. The court of appeals further agreed that decisions about leaf removal, maintenance of grounds and walkways, posting of warning signs, and closure of portions of the Cemetery were "inextricably tied to a variety of public policy considerations—including balancing public access with public safety, historical and cultural preservation, fostering a somber and reflective atmosphere, and conserving natural as well as fiscal resources." *Ibid.*[2]

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with the decisions of this Court or of any other court of appeals. Petitioner's claim seeks review only of how two courts consistently applied the correct legal test to the specific facts of her case. That claim does not merit this Court's review.

1. The decision of the court of appeals is consistent with the rulings of this Court. Both the district court and the court of appeals applied the two-prong test for identifying discretionary functions established by this Court's decisions in *United States* v. *Gaubert*, 499 U.S. 315 (1991), and *Berkovitz* v. *United States*, 486 U.S. 531 (1988). See Pet. App. A 3-4, B 2-3. Further, as required by that test (*Gaubert*, 499 U.S. at 324-325; *Berkovitz*, 486 U.S. at 544-545), both courts found that decisions regarding the maintenance and repair of the Custis Walk (1) were not

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[2] Judge Hamilton agreed that the cemetery officials retained discretion in dealing with maintenance of the Custis Walk (Pet. App. A 5 n.2), but disagreed with the application of the discretionary function exception because the government "was not called upon to make broad policy-based decisions and no unique circumstances are present," *id.* at A 6.

dictated by statute or regulation, but instead involved elements of judgment and choice, and (2) the discretionary decision-making reflected or was susceptible to public policy considerations. Pet. App. A, B 2-3.

Petitioner agrees (Pet. 7) that the correct legal test was applied, but disagrees with the outcome (Pet. 7-12). That claim presents no question of broad or enduring importance; it seeks only the correction of alleged error, which does not customarily warrant this Court's review. See *Sumner* v. *Mata*, 449 U.S. 539, 543 (1981). Pure error review is particularly unjustified where, as here, the district court and the court of appeals both agreed in their assessment of the record and their application of the proper legal standard to it. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949), adhered to on reh'g, 339 U.S. 605 (1950); see also *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996).

Petitioner also seeks this Court's review (Pet. 8-9) of the court of appeals' determination that the Pamphlet left discretion in cemetery officials regarding the posting of warning signs along the Custis Walk. Whether the Pamphlet constitutes a mandatory directive for purposes of the first prong of the *Berkovitz/Gaubert* test, however, is a question of fact that was determined against petitioner by both the district court and the court of appeals. Pet. App. A 4, B 2-3. This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

In any event, both courts correctly recognized that the Pamphlet fails to state how or when Cemetery employees must remove or repair hazards on walkways, or when a "hazard" will be held to have arisen. The Pamphlet, moreover, explicitly states that it is merely a guide. See *Cope* v. *Scott*, 45 F.3d 445, 451 (D.C. Cir. 1995) (manual that operates as guidebook preserves discretion in

government officials). Army Regulation 25-30 further explains that such pamphlets are not among those publications that are used to issue departmental policy. Pet. App. A 4; C.A.J.A. 401. While the Pamphlet establishes as one of its goals the protection of the public, it also leaves cemetery officials with discretion to decide when protective measures are necessary and what steps should be taken consistent with the solemn purpose and memorial atmosphere of the cemetery. It is precisely in such situations that this Court has held the discretionary function exception applicable. *E.g.*, *Gaubert*, 499 U.S. at 325-326.

2. Petitioner contends (Pet. 6, 10-12) that the determination that the cemetery officials' failure to post warning signs was based on public policy considerations conflicts with the decisions of four other circuits in failure-to-warn cases. None of the cases petitioner cites, however, established a broad rule limiting the discretionary function exception in failure-to-warn cases. Rather, each decision reflects the highly fact- and context-specific nature of discretionary function determinations. As a result, other failure-to-warn cases from those same circuits have found the discretionary function exception applicable and, in particular, have ruled that public policy considerations can underlie a decision not to erect warning signs. Compare *Faber* v. *United States*, 56 F.3d 1122, 1123, 1126-1128 (9th Cir. 1995) (where other warning signs had already been erected at site and relevant rules left the agency no discretion, discretionary function exception inapplicable to failure-to-warn claim); *Cope* v. *Scott*, 45 F.3d 445, 451-452 (D.C. Cir. 1995) (where 23 traffic warning signs were already posted, failure to warn of slippery road conditions did not fall within discretionary function exception); *Andrulonis* v. *United States*, 952 F.2d 652, 655 (2d Cir. 1991) (failure to warn of laboratory

conditions conducive to transmission of rabies virus not a discretionary function), cert. denied, 505 U.S. 1204 (1992); and *Boyd* v. *United States*, 881 F.2d 895, 898 (10th Cir. 1989) (failure to warn swimmers in a popular swimming area not susceptible to policy analysis), with *Valdez* v. *United States*, 56 F.3d 1177, 1180 (9th Cir. 1995) (Park Service decisions regarding maintenance of park trails, posting of warning signs, and other safety precautions involve competing policy considerations falling within discretionary function exception); *Childers* v. *United States*, 40 F.3d 973, 976 (9th Cir. 1994) (decisions regarding the posting of warning signs on Yellowstone National Park trails based on public policy factors are within discretionary function exception), cert. denied, 514 U.S. 1095 (1995); *Kiehn* v. *United States*, 984 F.2d 1100, 1103-1105 (10th Cir. 1993) (decision not to place warning signs near petroglyphs at Dinosaur National Monument involved balancing public policy objectives of resource allocation, visitor safety, and scenic preservation); *Zumwalt* v. *United States*, 928 F.2d 951, 955 (10th Cir. 1991) (maintenance and placement of warning signs on trail at Pinnacles National Monument required a balancing of social, economic, and political policies).

As those cases recognize, the proper inquiry is not whether the policy considerations were "broad" or "unique" (Pet. 6), but whether the discretionary decision "is grounded in the policy of the regulatory regime." *Cope*, 45 F.3d at 449; see also *Gaubert*, 499 U.S. at 323, 325. The cases cited by petitioner (Pet. 11-12) concern dangerous driving conditions, rabies contamination, and the zoning of swimming areas, not the management of historic and scenic walkways within a national park. The policy considerations invoked by the relevant government officials in the cases petitioner relies upon thus did not pertain to the underlying regulatory programs. See

Faber, 56 F.3d at 1127 & n.4 (comparing situations where decision to erect warning signs does and does not implicate relevant public policy considerations); *Cope*, 45 F.3d at 452 (aesthetic considerations do not trigger exception where relevant roadway is managed as a commuter route with no less than 23 traffic control signs already in existence); *Andrulonis*, 952 F.2d at 655 (government's failure to warn "'cannot be said to be based on the purposes the regulatory regime seeks to accomplish'") (quoting *Gaubert*, 499 U.S. at 324 n.7); *Boyd*, 881 F.2d at 898.

In the present case, by contrast, the policy considerations balanced by cemetery officials—maintaining a somber and reflective atmosphere, ensuring public access, preserving the history and culture of the cemetery, and conserving natural resources—directly relate to the overall regulatory mission of establishing and operating a national shrine dedicated to the country's honored dead. The special historical significance and role of the Custis Walk magnify the importance to cemetery officials of weighing aesthetic, atmospheric, and public access concerns before erecting warning signs. See *Cope*, 45 F.3d at 452 (for purposes of discretionary function analysis, posting of warning signs along a commuter road cannot be compared to "the Grand Canyon's Rim Drive, nor Shenandoah's Skyline Drive").[3]

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[3] Even if a conflict existed between the court of appeals' ruling here and the decisions of other circuits, it would not be a mature inter-circuit conflict warranting this Court's review. The court of appeals' opinion is unpublished and thus does not represent the law of the circuit and has limited precedential value. See 4th Cir. R. 36(a), (b) & (c).

Because the court of appeals' decision is correct and comports with the rulings of other courts, this Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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